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The Other State's Interests

Choice-of-law scholarship, these days, is engaged in sorting through the basic building blocks of modern choice-of-law theory, trying to determine what is worth saving, what should be discarded, and what should be modified to better fit current needs. One important question currently under reconsideration is the concept of an "interest." This article examines the method that the forum uses in determining another state's interests and suggests that the forum should follow a somewhat different approach when defining the other state's interests than it uses in ascertaining its own. Furthermore, scholars should take this difference into account when recommending to the forum how it ought to go about applying modern choice-of-law methods.

The forum should use a different method for ascertaining other states' interests for the same reason that it uses a different method for ascertaining other states' *substantive law*. When it ascertains its own law, the forum is engaged in a creative enterprise. It is trying, within the constraints of binding precedent and statutes, to decide what is the best solution to the particular legal problem. This creativity is particularly pronounced when a common law substantive rule is employed, for the judge is not constrained by legislative preference. In contrast, when a forum court sets out to ascertain another state's law, it is attempting to ascertain what the other state thinks is the best solution to a particular legal problem. This latter enterprise is more of a factual inquiry than the former, which is unabashedly a lawmaking function.¹ Furthermore, scholars are more useful in the normative enterprise of deciding what solution is best than in the factual enterprise of determining what other states think is the best solution.

In developing and defending this view, I am driven back to some fairly obvious and fundamental points about why state substantive laws differ and what courts are supposed to do in the face of such divergence.

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1. Linda Silberman has reminded me that courts traditionally treated determination of foreign law as a question of fact, for the trier of fact to decide. 3 J. BEALE, *THE CONFLICT OF LAWS* § 621.2 (1935). This point is suggestive, although modern practice on this issue has, of course, changed. See, e.g., FED. R. CIV. P. 44.1 (content of foreign country law is a question of law).

The starting point, in other words, is the question of why we have choice of law in the first place. Such questions seem rather elementary, but they lead to an important point.

I. Why Laws Differ and Why This Matters

Why do we have choice of law? The answer is easy enough. We have choice of law because substantive laws differ from one state to another and because there are cases that have connections with more than one state in which it is not obvious which of the different state laws should supply the rule of decision.

Why, then, do state laws differ? Here, again, the answer is clear. State laws differ because different groups of people (represented by their different state legislatures and common law courts) have different ideas about what law is best. More specifically, there are at least two reasons why state substantive laws differ. First, states may have different ideas about what values to promote—whether to protect consumers or producers, to promote economic efficiency or fairness, or to encourage the arts, sciences, or traditional family values. Second, states may disagree about which means to these ends are appropriate and effective. Are consumers better protected under a regime of strict liability or under a negligence regime that tries to keep prices low? The conditions of empirical uncertainty under which most lawmaking takes place guarantee that even states that agree on the ultimate goals of legislation are likely to disagree about the best means to achieve those goals. The result of such disagreement is different substantive laws.

Differences in substantive law mean that judges must occasionally apply rules which they did not help to create, for courts deciding multi-state cases sometimes apply the law of another state and federal courts sometimes apply state law. When a judge applies the law of another jurisdiction, his or her creative leeway is fairly circumscribed. The judge is obliged to ascertain as well as possible what the other jurisdiction would want. Ideally, we might like to have some sort of certification procedure so that the other state could be consulted about its preferences.² But since that is usually not possible, the judge must consult whatever evidence is available and if the evidence is inconclusive he or she must make an educated guess. The ideal result would be the one the other state would itself have reached. If the judge differs from the other state's lawmakers on empirical assumptions or normative preferences, it is the other state's assumptions and preferences that should count.

When a judge sets out to ascertain what local law requires, a greater amount of latitude is present. The precise amount of freedom depends on two things: the extent to which existing authoritative materials address the legal question, and the position of the judge in the hierarchy. The existence of authoritative materials matters because where

2. Corr & Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411 (1988).

there is no pre-existing authority, even a lower court judge is free to decide the issue *de novo*, according to what seems just and sensible. Of course, few issues are totally open in this way; usually some guidance can be found in the case reports, constitutions, or statute books. This decreases the extent of the judge's discretion. The second factor is the judge's position in the judicial hierarchy, for the higher a judge is positioned on the appellate ladder, the greater the judge's authority is to overrule existing precedent. For a judge deciding an issue of domestic law, there may be a great deal of room in which to maneuver or there may be very little.

On issues of local law, a certain amount of discretion is both inevitable and desirable. Judges are authoritative officials of state government; it is part of their job to set state policy. On issues of foreign substantive law, in contrast, a local judge has no role as authoritative expositor. While the judge may have to make educated guesses about the content of foreign law, the local judge is acting merely as a proxy for the foreign lawgiver. In consequence, the local judge has no authority to overrule the other state's determination of its own law. A New York judge can chart new paths in New York law, overturning established precedents or adopting a novel construction of state statutes. New York law is what the New York judges say it is. A New York judge has no such creative latitude in applying Connecticut law; even a judge from the highest court in the state must adhere to existing interpretations of the other state's legal rules.

Choice-of-law theory recognizes that judges accept the other state's definition of its own substantive law. Some choice-of-law methods, admittedly, permit or encourage judges to pass judgment on the substantive laws of other states. A judge who asks which law is "better," more progressive, or a more accurate reflection of underlying policies of the substantive field as a whole exhibits confidence that there are objective standards for evaluating the competing laws.³ Most choice-of-law methods, however, do not ask judges to make this evaluation. Instead, they expect a judge to remain neutral as to the substantive wisdom of the competing laws. This is not to say that the laws in question will be treated equally. A judge may, for instance, be advised to prefer forum law over the law of other states.⁴ However, this is not because forum law exhibits wisdom superior to other state's law, but simply because it is forum law and the forum's courts thus have some special responsibility to prefer it.

Moreover, even when a local judge declares that foreign law is substantively inferior to local law, this does not involve overriding foreign judges about what the foreign law currently is. If a New York judge

3. See, e.g., Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966) ("better law" approach); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(e) (politics underlying general field of law).

4. See, e.g., B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 75, 184 (1963) (preference for forum law).

states that local law is "better" than Connecticut law because New York law allows strict liability while Connecticut requires proof of negligence, the New York judge still recognizes that on questions of interpretation the Connecticut judge's decisions are authoritative. To my knowledge, no choice-of-law theory advises the local judge to contradict foreign judges about the contents of foreign substantive law. Even "better law" theories recognize the superior authority of the foreign court.

This rather uncontroversial point bears also on how local judges treat foreign choice-of-law rules. Just as substantive laws vary from one state to another, choice-of-law methods differ too. One state may use the Restatement Second, another the Restatement First, still another may use interest analysis or comparative impairment. Even states that use the same choice-of-law system may have different ideas about what it means or what it requires in particular cases.

Why do states differ on issues of choice of law? One would expect the same obvious answer that explains substantive differences. State courts and legislatures have different views about what values to promote and about what means to use to promote them. One state may choose uniformity and predictability as the highest virtues and may apply the First Restatement in pursuit of them. Another state may agree about the value of predictability but decide that it is better to promote predictability by applying the law of the only interested state. Or a state may determine that uniformity, while a virtue, is impossible to achieve and should not even be pursued. A third state may think that uniformity and predictability are vastly overrated and simply apply *lex fori*. As with substantive law, lawmaking in choice of law takes place under conditions of empirical uncertainty. Even when consensus is reached about goals, it cannot necessarily be reached about means; and even in conditions of relative empirical certainty, disagreement about ultimate values may lead to divergent opinions.

When states choose different choice-of-law methods, it is not necessarily the case that one of them is "mistaken." When the difference is based upon different value choices, characterization of the difference as a mistake seems inappropriate. Value choices seem subjective; if states have identified different goals, it makes no sense to call one right and one wrong. States are entitled to have different objectives.

One might argue that if the difference is based upon different empirical assessments, then at most one of them is right, and the other must be wrong. But even when the difference is primarily a result of empirical uncertainty, there are problems with characterizing solutions in this way. Choice-of-law divergence is no different from substantive law divergence. Except for those choice-of-law theorists that espouse some variation on the "better law" approach, the choice-of-law enterprise typically withholds judgment on differing substantive laws. This is true despite the fact that substantive differences may be based on empirical disagreement, and despite the likelihood that one state's empirical assessment may be more accurate than another. A state is entitled to

adopt controversial empirical premises in the exercise of its lawmaking capacities. Perhaps strict liability does not protect tort victims; perhaps all it does is line the deep pockets of the lawyers. Yet, choice-of-law theorists typically refrain from inquiring into the accuracy of the contending substantive laws or into the extent to which the contending laws manifest different empirical assumptions as opposed to different values.

If choice-of-law specialists refrain from labeling contending substantive laws as either "right" or "wrong," it seems that they should exercise comparable restraint when confronted with differing choice-of-law regimes. Is there any reason to treat choice of law as more susceptible to "objective" evaluation than substantive law? Why should choice-of-law solutions be "true" or "false" if substantive laws aren't characterized that way? It would seem that if we are prepared to show respect for another state's substantive lapses in judgment, then we should show the same respect for its choice-of-law foibles. Tort law specialists realize, without being required to surrender critical judgment, that when a bad proposal is adopted through legislation it becomes law as surely as when a good proposal is adopted. The bad proposal is law even though it is bad law. As choice-of-law scholars, we should have exactly as much right to criticize a bad choice-of-law proposal, no more and no less. It is hard to see why choice-of-law theorists should have any different editorial leeway with choice-of-law methods than tort specialists do with tort law.

II. The Role of Choice-of-Law Scholars

What does all of this mean for the choice-of-law process? One thing it might mean is that choice-of-law specialists ought to exhibit equal enthusiasm for all choice-of-law proposals. Clearly, however, this cannot be the consequence. Tort specialists do not act as though all possible variations on tort law are equally good, so there seems little reason that choice-of-law scholars should act as though all choice-of-law possibilities are equally good.

The fact that conflicts scholars have a right to criticize state conflicts law does not mean, however, that they should counsel states to disregard one another's conflicts choices. The right to criticize particular legal proposals means something distinctive in the choice-of-law context because choice of law deals with multijurisdictional problems. A scholar advising a forum court must take a somewhat different attitude towards the *forum's* potential "mistakes" than he or she should take when advising the forum what it ought to do about the other state's "mistakes." A forum court is in a position to do something about its own mistakes, namely, it can avoid making them or it can correct them; but it is in no position to do anything at all to remedy the mistakes of other states.

Critical scholarship in choice of law aims to improve the law, but there is little chance that argument addressed to a New York judge can improve Connecticut law. Scholars criticize legislation on empirical and

normative grounds in part because, as academics, the academic enterprise interests them; but in instrumental terms, the scholarly object is to convince the lawmakers (judges, legislators, perhaps drafters of constitutions) of the superiority of the particular academic's views. We all have visions of law reform commissions or judges (or their clerks) turning to our articles for guidance. This does not mean, however, that we know better than judges what the law already is. The law is, after all, what the judges say it is. In other words, if judges or legislators ignore our recommendations, the decisions that they reach do not for that reason fail to be law. As scholars, we can advise a New York judge applying New York law, but we have little role to play in advising New York judges about Connecticut law.

This point can be illustrated by analogy to the role of academic criticism of state law in federal courts. In diversity cases, and in many federal question cases, federal courts apply state law.⁵ When called upon to apply state law, federal courts are not interested in what state law ought to be; they are interested in what state law already is. Academic criticism of state law is not particularly useful in determining state law, although academic writing that merely sets out existing precedents is naturally quite useful. Of course, when there is truly no state authority on the issue, a judge might well turn to academic conceptions about what the law ought to be. By and large, critical academic writing about state law issues is addressed to the states that adopt the various state laws, not to the federal courts. Federal judges are not the innovators on state law issues. Similarly, in conflict of laws the forum has no particular reason to take an interest in academic criticism of the laws of the other state. It has no legitimate role to play in the process of norm formation in the other state.

As argued above, conflicts scholars have the same role to play in choice of law that substantive law scholars have to play in substantive fields; but there is something distinctive about academic criticism of choice of law. Scholars generally have a right to advise a judge about how to exercise his or her discretion over issues within the judge's proper decisionmaking competence. In multijurisdictional cases, there are large numbers of issues that are beyond the judge's decisionmaking competence because they are part of the law of another state. In both conflicts and substantive law, scholars seek to influence judges with empirical and normative arguments about what law is best. But in neither area are these arguments relevant in determining what the law currently is. And, in choice of law, the question of what the law currently is is an important one, indeed, the only one relevant to ascertaining the laws of other jurisdictions.

5. Rules of Decision Act, 28 U.S.C. § 1652 (1982). On the importance of state law in federal question cases, see Westen & Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980).

III. "Interests" and State Substantive Law

All of this may seem beside the point to the choice-of-law scholar. He or she is not, one might respond, trying to influence the forum to intervene in the formulation of norms in the other state. Except perhaps for the "better law" scholars, choice-of-law academics have no desire to pass judgment on the substantive laws of the involved states. Choice-of-law scholars recognize that states have different opinions on both issues of value and empirical questions, and they recognize that it is an exercise of sovereign lawmaking capacity for state courts and legislators to make authoritative decisions in the face of disagreement and uncertainty. Modern choice-of-law theory does, however, require the forum judge to pay some attention to the laws of other states and in doing so requires them to make some decisions about the other states' laws. The forum must ascertain foreign law when it decides whether the foreign state has an interest in having that law applied. While making those decisions, moreover, courts find themselves lobbied by legal scholars. By addressing the issue of the other state's interests, choice-of-law scholars play a role in helping the forum court to define the content or scope of the other state's law. Modern interest analysis, in particular, performs that function by advising the forum about when the other state is interested in a dispute. Interests, after all, are an outgrowth of state substantive law, for modern choice-of-law theory emphasizes the unity of choice of law and substance.⁶ This is the insight of the policy analysts; choice of law is a means to the end of furthering substantive values. Choice of law concerns the appropriate scope to give a legal rule in the multistate context. This decision about scope is not qualitatively different from other, domestic, issues of scope.⁷ Both choice of law and substantive law concern whether some particular rule of law "applies," and this is to be determined by consulting the policies underlying the legal rule.

Modern theory offers suggestions about how this function of interpreting substantive rules ought to be performed. It does this through its analysis of when states have "interests," for a state is said to have an interest in having its law applied when the statute, properly interpreted, is held to apply to some particular multistate case. The forum is obliged to determine whether it has an interest in having its law applied, and it must also determine whether the other state has an interest in having its law applied. This means that the forum must interpret both its own and the other state's law. The theory of interests in this way tells the judge how to interpret the laws of the forum and of the alternative state. The problem concerns the role of the forum in interpreting the laws of the other state and of the role of conflicts scholarship in guiding courts towards the proper interpretation of the other state's laws.

Consider the familiar example of *Milliken v. Pratt*.⁸ Interest analysts

6. For a discussion of the dispute on this subject, see generally L. BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* 48-50, 100-03 (1991).

7. *Id.* at 48-50, nn.20, 21, 23, 24.

8. 125 Mass. 374 (1878).

have examined the myriad variations on this conflicts chestnut, which has four possible factors: the plaintiff's domicile, the defendant's domicile, the place where the contract was made, and the forum.⁹ In a case where Massachusetts is the forum, the parties are both from Massachusetts, but the contract was formed in Maine, the Massachusetts judge must decide whether Maine has an interest. This involves interpreting the Maine rule of law to determine whether the policies underlying it support its application to the particular facts of the case. On such issues, it would seem that the Maine court would be a much better judge than the Massachusetts court for the same reasons that the Massachusetts court would be better at ascertaining its own interests. But if this is true, then the forum court would have greater leeway in identifying its own interests than it would have in determining the other state's, for it has lawmaking discretion over the former issue but not the latter.

When a scholar advises a court how to determine its own state's interests, he or she is acting in an advisory capacity. In this capacity, the scholar acts no differently than a scholar advising a court regarding the best rule of tort law to adopt. When a scholar advises the court how to determine the applicability of the law of the other state, however, it is impossible to characterize the role as advisory. The other court is not in the process of considering revising its rule; the content of the current rule is more or less settled, its rightness or wrongness not in issue. There is no more reason for the judge to consult scholars about the rightness or wrongness of the other state's choice-of-law rules than there would be reason for the judge to consult academic criticisms about state substantive law, or for a federal judge to consult scholars about the rightness or wrongness of state substantive law.

IV. "Objective" and "Subjective" Definitions of Interests

When choice-of-law scholars discuss whether a state has an "interest" in having its law applied, the assumption seems to be that this is a matter that can be decided by appeal to reason, by scientific methods, or by deduction.¹⁰ If determination of interests were merely a mechanical and value neutral process, then the forum court might be perfectly capable of deciding for itself whether another state had an interest in the subject. There would be right and wrong answers to the question. But if questions about statutory scope are matters of state choice, then it would seem that other states should respect the definition of "interests" regardless of whether it is ideal or even rational. They should respect the choice for the same reasons that they respect a suboptimal substantive choice; namely, that legal decisions of other states reflect both dif-

9. See, for instance, the discussion in B. CURRIE, *supra* note 4, chapter 2.

10. See, e.g., Posnak, *Choice of Law: Interest Analysis and Its "New Critics,"* 36 AM. J. COMP. L. 681, 687 n.42 (1988); Kay, *A Defense of Currie's Governmental Interest Analysis,* 212 RECUEIL DES COURS 13, 53-54, 125 (1989).

ferences in values and differences in empirical assessments in the face of uncertainty.

In another forum, I have described this issue in terms of whether interests are "subjective" or "objective."¹¹ Interests are defined subjectively if the existence of an interest depends on whether the state itself, acting through its authoritative decisionmakers, believes that it has an interest. Interests are defined objectively if interests either exist or fail to exist independently of whether the state believes it has an interest. Under a subjective definition of interest, for example, a state would have an interest in an in-state accident case if the state provides that its substantive law is applicable to accidents occurring within the state. A subjective definition of interests recognizes that states have the same sort of leeway in choosing the applicable choice-of-law rule as they do in choosing the applicable substantive rule. In contrast, under an objective definition of interests, a state could provide that an interest exists when the accident occurred within the state, but this might be a mistake and other states would be free to disregard this provision.

Most modern choice-of-law scholars apparently adopt an objective definition of interests.¹² Currie almost certainly did, although he did not address the question in quite these terms.¹³ The problem with adopting an objective definition of interests is that it is hard to see why states should have leeway in adopting "suboptimal" substantive laws but have no leeway in adopting choice-of-law rules perceived as suboptimal. If the other state is entitled to use its own best judgment in determining whether its law should apply in uncertain domestic contexts, why should it not be entitled to use its own best judgment in determining whether it should apply to multistate cases?

If we take seriously the idea that conflict of laws is really an extension of substantive law, then it would seem that the forum ought to treat the other state's determination regarding the territorial scope of its statute with the same deference as it treats the other state's determination of what substantive rule to apply. Each of these determinations should be taken as given, not as a subject for critical reevaluation. But this means that the proper attitude towards forum law should be different from the proper attitude towards the law of the alternative state. For the forum is of course free to reevaluate its own law, and the scholar is free to suggest how forum law should be improved.

Modern conflict of laws, in other words, necessitates two different definitions of "interest" if the modern policy analysis is to make sense. While one is a normative concept, the other is a descriptive concept. This phenomenon is particularly important in multijurisdictional problems because it arises whenever one court applies the laws of

11. L. BRILMAYER, *supra* note 6, at 73.

12. *See supra* note 10.

13. Currie argued, for instance, that the forum did not need to consult the other state's choice-of-law rules in determining whether an interest existed. B. CURRIE, *supra* note 4, at 184.

another; its attitude towards its own law is different from its attitude towards another's. But the difference in attitude does not just apply to choice-of-law issues. The reason that a state must take a different attitude toward its own and the other state's laws applies to substantive as well as choice-of-law issues. The reason that it resists critical reevaluation of the other state's definition of territorial scope is the same reason that it resists critical reevaluation of the other state's choice of substantive rules.

Conclusion

The difference in function between definition of local and foreign interests casts light on the ongoing debate about whether courts can really identify interests by looking at the policies underlying substantive statutes. Some scholars object that "interests" are not really derivable from substantive statutes, that they are figments of the imaginations of modern choice-of-law scholars.¹⁴ Others respond that the choice-of-law enterprise, under modern theory, is no different from substantive interpretation; that policy analysis "goes on all the time."¹⁵ While this is in one sense true, it does not necessarily lead to the conclusion that the modern choice-of-law scholars prefer.

Policy interpretation is a creative enterprise; it is not a mechanical process of deducing "right answers" from statutes and common law rules. In many cases, several answers are arguably compatible with the existing substantive law. The judge's job is to choose one; the choice is an exercise of lawmaking power. In this sense, identification of interests is like substantive interpretation: both involve resolving apparent indeterminacy in a way that provides authoritative guidance for the future. The two functions are the same in that judgment must be exercised and genuine choices must be made. The answer is not "found in" or "derived from" the statute. The critics of interest analysis are correct that choice-of-law scholars do not find their solutions in the substantive laws themselves. But this is not problematic where a court interprets its own law, for courts do indeed interpret their own laws creatively in domestic cases as well. It is problematic only when the forum court purports to interpret the laws of other states, a role for which it has no authoritative status.

Two conclusions follow. First, the preferred premises of modern theorists about when interests exist are not the only possible solution to the problem. Courts are free to disagree about whether an interest exists in a particular case, and their answers cannot be dismissed out of hand as simply "wrong." Second, the forum should respect another

14. See T. DE BOER, *BEYOND LEX LOCI DELICTI* 440 (1987). See generally Juenger, *Governmental Interests — Real and Spurious — in Multistate Disputes*, 21 U.C. DAVIS L. REV. 515 (1988); 1 E. RABEL, *THE CONFLICT OF LAWS* 105 (2d ed. 1958).

15. Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 762-63 (1963).

state's determination of whether an interest exists. As to its own interest, it must make up its own mind; as to the others, it should respect an authoritative determination that has already been made.

